From: Luke A. Kanies
To: Microsoft ATR
Date: 1/21/02 4:19pm
Subject: Microsoft Settlement

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To whom it may concern:

My name is Luke Kanies, and I am currently employed as an Infrastructure Architect in the computer industry, and have been in the computer industry for nearly six years. I have worked with all currently popular computer platforms, and have long taken an interest in the computer industry as an entity, rather than just specific technologies or companies.

It is my opinion, based on my technical understanding of how Microsoft impacts the computer industry, that the proposed settlement will be bad for the computer instustry, and possibly even bad for Microsoft. Further, even if I thought that the remedy itself were enough, the fact that it contains no actual punishment for not staying within the agreement would be enough for me to be convinced of the agreement's inadequacy.

First, the remedy:

The proposed settlement does not in any way limit the source of Microsoft's power, it merely addresses some of the ways in which Microsoft has already abused its power--it does not attempt to limit the ways in which Microsoft will attempt to gather power in the future.

Some of the key areas I believe that the settlement should have addressed but did not are: Proprietary file formats, illegally leveraging their monopoly to enter new markets (such as game consoles and ISP services), and modifying existing standards in a non-standard way in order to interfere with vendor compatibility.

Proprietary file formats:

One of Microsoft's main sources of income is from their Office suite (I believe it is greater than 50% of their income). In fact, I find it curious that this case covered Microsoft's monopoly in operating systems but seemed to largely ignore their even more entrenched monopoly in office suites.

One of the main reasons that Microsoft has such a strong market presence in office suites is because their file formats are proprietary; for instance, my wife's father owns a commercial architecture firm (Ritterbush, Ellig, Holsing, in Bismarck, ND) which was forced to switch from using Corel WordPerfect to Microsoft Word because many of their customers required communication using Microsoft's proprietary file formats. Even though he preferred the non-Microsoft application, he was forced to give in to Microsoft's monopoly because other vendors are unable to effectively reverse-engineer Microsoft's file formats and thus support them.

That difficulty is not accidental, either. Microsoft has a history of modifying their file formats with each new version of software, both to force users to upgrade and also to make it more difficult for non-Microsoft programs to read these formats. This trick would work against Microsoft if they were not a monopoly, but because of their market share it works very well in forcing users to always spend the money on the latest versions of Microsoft Office while keeping other vendors from supporting the current version of the file formats.

I believe that any settlement agreement should stipulate that Microsoft publicly release specifications for every file format or protocol which they either have a monopoly in (such as their Office formats) or is used or required by a product which they have a monopoly in (such as their file sharing protocol, CIFS).

Illegally leveraging their monopoly:

As we all know, it is not illegal to have a monopoly, it is only illegal to use the power from the monopoly to either maintain it or to enter new markets. The settlement agreement discusses specific instances of this,

but in no way attempts to discuss this in general terms. This is a serious failing of the settlement agreement, because it only hopes to address current illegal behaviour but in no way attempts to curtail different types of future illegal behaviour.

Even using specific examples, it is very easy to find examples of Microsoft leveraging their monopoly to enter new markets, which is illegal (because they have already been found to be a monopoly). Two of the most pertinent examples are their MSN service and their Xbox gaming console.

MSN could not succeed if every copy of Microsoft Windows did not come with a client for it. This is an obvious example of Microsoft leveraging their monopoly in operating systems to enter the market of Internet Service Providing. In fact, MSN is now the second largest ISP in the country, purely because of the level of placement it gets in all Microsoft products. According to antitrust rules, this is clearly illegal, yet the settlement agreement does not even mention this very important area.

Another very high profile area which Microsoft has leveraged their monopoly to enter is gaming consoles. The main touted advantage of Microsoft's Xbox is that game developers can use roughly the same programming APIs (Application Programming Interfaces) on the Xbox as they do on Windows, making game development easier. Again, this is a clear example of Microsoft using the monopoly of their Windows OSes and the resulting ubiquity of Microsoft Windows APIs to leverage themselves into another, unrelated, market. This is another example of something which antitrust law states is illegal but which is not even mentioned in the settlement agreement.

In addition to Microsoft using their marketshare to branch into new markets, both of the above products have lost or will lose so much money that if they had been attempted in the same manner by another company, they would have likely forced that company out of business. However, because of all of the money Microsoft has been able to accumulate, as a direct result of their monopoly, they are able to afford to lose significant amounts of money just in order to get into a new market. Of course, this was exactly how they gained dominance in the browser market, also.

Modifying standards:

One of the practices Microsoft is most famous for, often called "embracing and extending", is taking an existing standard as developed by an independent standards body (such as the IETF) and adopting it while modifying it slightly. This adoption and modification allows Microsoft to claim compliance yet actually makes Microsoft's products incompatible with products which implement the actual standard.

Without going into detail about them, some examples of standards which Microsoft has adopted but modified to suit their tastes are Java (a programming language whose modification resulted in a lawsuit which Microsoft lost), LDAP (a directory server protocol which Microsoft's Active Directory and Exchange services use), and DNS (which their Active Directory also uses).

In a normally operating free market, if a non-monopoly chooses to implement a modified form of a standard, then that company is nearly always punished for that choice. Microsoft's monopoly, however, protects them from the punishment that would normally be inflicted on them; this unfair protection from free-market rules is one of the main reasons for antitrust laws in the first place, so it would certainly make sense if any settlement agreement attempted to make Microsoft once again subject to the laws of the marketplace. Instead, the proposed settlement agreement is strangely silent on this entire concept, thus giving Microsoft further free reign to force their modified standards onto an unwilling computer industry.

Enforcement:

As to what happens to Microsoft if they fail to uphold the restrictions included in the settlement agreement, that is the portion of the agreement that I find most lacking.

The enforcement clauses of the settlement agreement remind me of the old stories of a British police officer's lack of credible threat: "Stop, or I'll say stop again!". As far as I can tell, if Microsoft does not follow the settlement agreement, then their punishment will be that the length of the agreement will be extended. Their will be no monetary punishment, no marketplace or legal punishment, merely that as long as Microsoft does not follow them, the rules will continue to be in effect.

This is purely nonsensical, as it provides no real motivation for Microsoft to even follow the terms of the agreement. There are no teeth to it forcing them to comply, merely an advisory panel which will report of their level of compliance.

As demonstrated by Microsoft's lack of compliance to their 1995 "Consent Decree", it is imperative that any settlement contain specific monetary or legal punishments in the event of their lack of compliance with the agreement. Anything less is providing them nearly free reign to continue to flout the law.

Even if monetary punishment clauses are added, they must be large enough to actually serve as a threat to Microsoft. They have the largest, or one of the largest, market capitalizations in the world, and have billions in cash and tens of billions in essentially liquid forms; fining them one million dollars, or even ten million dollars, isn't really enough money for them to notice. Any monetary punishment should be equivalent to the money they have gained through illegally maintaining their monopoly, and that number is at least into the billions of dollars.

Conclusion:

Although these are what I believe to be the most obvious problems with the proposed settlement agreement, they are by no means a comprehensive list of the problems I find. Generally speaking, I find the settlement to be extremely light, given that Microsoft has already been found to be a monopoly by the US Court of Appeals and has been found to have illegally maintained and leveraged that monopoly, and given the obviously huge amount of money they have earned from having and maintaning (illegally) this monopoly.

It is especially galling that the US Department of Justice proposed a harsher settlement before Microsoft was even found to be a monopoly, yet now that Microsoft has lost that battle the US DoJ has decided to reduce their demands, rather than increasing them.

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